BRB No. 00-0658

STEPHEN S. MERTIG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
D&M FIBERGLASS SERVICES, INCORPORATED	)	DATE ISSUED: March 27, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden L.L.P.), Norfolk, Virginia, for claimant.

Steven H. Theisen (Midkiff & Hiner, P.C.), Richmond, Virginia, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-1728) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who worked as a technician for employer, was earning $12.50 per hour in August 1995 when he declined an additional one dollar per hour increase in his salary in exchange for coverage under employer's health insurance policy. In August 1996, claimant dropped his health insurance coverage with employer and received a one dollar increase in his hourly wage. On November 3, 1996, claimant suffered a work-related injury to his back

and filed claims under the Act and the Virginia workers' compensation scheme.[1] Claimant returned to work for employer for one day on February 10, 1997, but was terminated thereafter. He subsequently obtained employment with several non-maritime employers.

In his Decision and Order, the administrative law judge determined that the one dollar per hour claimant declined in favor of health insurance coverage between August 1995 and August 1996 should not be included in the calculation of claimant's average weekly wage. Applying Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge determined that claimant's average weekly wage was $525.03. The administrative law judge awarded claimant temporary total disability compensation from November 4, 1996 through May 13, 1997, and temporary partial disability compensation thereafter. 33 U.S.C. §908(b), (e). Specifically, for each period of temporary partial disability, the administrative law judge arrived at a weekly loss in wage-earning capacity by adjusting claimant's post-injury wages downward by the percentage increase in the National Average Weekly Wage (NAWW) for each year, in order to account for inflation.

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage. Specifically, claimant contends that the administrative law judge erred by not including the extra one dollar per hour employer did not pay claimant in exchange for health insurance benefits during the year preceding his injury. Claimant further contends that in awarding temporary partial disability compensation, the administrative law judge erred by failing to make any downward adjustments in the periods of disability from May 14, 1997 to September 30, 1997. Lastly, claimant asserts that the administrative law judge erred by not making the downward adjustments in his post-injury wages by comparing each increased NAWW with the NAWW in 1996. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's challenge to the administrative law judge's average weekly wage calculation. The issue in the instant case is whether the one dollar per hour claimant did not receive in wages between August 1995 and August 1996, in exchange for

[1]Claimant was awarded temporary total disability compensation of $373.86 per week from the Virginia Worker's Compensation Commission from November 4, 1996 through May 13, 1997, and June 26, 1997 though July 1, 1997, based on an average weekly wage of $560.79. He was awarded temporary partial disability compensation for the period May 14, 1997 through June 25, 1997, and various periods subsequent to July 1, 1997.

coverage under employer's health insurance policy, should have been included as wages in calculating claimant's average weekly wage. Section 2(13) of the 1984 Act defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13)(1994).[2] Relying on *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1998), and *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999), claimant asserts that since the value of employer's health coverage is ascertainable, one dollar per hour, it should have been included as wages in

[2]Section 2(13) as amended in 1984 codifies the holding of the United States Supreme Court in *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT)(1983). In *Morrison-Knudsen*, the Court, in construing Section 2(13) prior to the 1984 Amendments, stated that where benefits received are not "money recompensed," or "gratuities received from others," the narrow question is whether the benefits are a "similar advantage" to board, rent, housing, or lodging in that the benefits have a present value that can be readily converted into a cash equivalent on the basis of their market value. The Court held that employer contributions to union trust funds for health and welfare, pensions, and training were not such "similar advantages." *Morrison-Knudsen*, 461 U.S. at 630, 15 BRBS at 157(CRT).

the calculation of his average weekly wage. We disagree. Both *Wright* and *Story* are inapposite to the instant case, as those cases concern whether holiday, vacation and container royalty payments, and tips are properly included as "wages" within the first sentence of Section 2(13). The instant case concerns whether the value of employer's health insurance coverage should be included in the calculation of claimant's average weekly wage. In this regard, the second sentence of Section 2(13) specifically excludes employer's payments for, or contributions to, a health and welfare benefit plan. *See* 33 U.S.C. §902(13)(1994). Based on the plain meaning of the second sentence of Section 2(13), we hold that the administrative law judge properly did not include the value of employer's contributions to claimant's health coverage as wages in the calculation of claimant's average weekly wage. Accordingly, the administrative law judge's determination that claimant's average weekly wage is $525.03 is affirmed.

Next, claimant contends that in determining the amount of temporary partial disability benefits, the administrative law judge's method of adjusting claimant's post-injury wages to account for inflation was in error. Specifically, claimant contends that the administrative law judge erred by failing to make any downward adjustments in the periods of disability from May 14, 1997 to September 30, 1997. Moreover, claimant asserts that the administrative law judge erred by not making the downward adjustments in his post-injury wages by comparing each increased NAWW with the NAWW in 1996.

An award for partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (e), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury earnings must be adjusted back to the wage level paid at the time of claimant's injury in order to neutralize the effects of inflation when this figure is compared to claimant's pre-injury average weekly wage. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT)(D.C. Cir. 1986); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Where, as in the instant case, the actual wages paid at the time of the injury in claimant's post-injury job are unknown, the Board has held that the percentage increase in the National Average Weekly Wage (NAWW) should be applied to adjust a claimant's post-injury wages downward in order to account for inflation. *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).

In the instant case, we hold that the administrative law judge's decision to not make any downward adjustments in claimant's post-injury wages for the three periods of temporary partial disability from May 14, 1997 through September 30, 1997, is rational, as there was no change in the NAWW from October 1, 1996 to September 30, 1997. For the various periods of temporary partial disability after September 30, 1997, the administrative law judge adjusted claimant's post-injury wages by applying the percentage change in the

NAWW for each year, as opposed to aggregating the percentage change in the NAWW since 1996. *See* Decision and Order at 7-8. Contrary to claimant's assertion, the administrative law judge's method of adjusting claimant's post-injury wages to account for inflation is rational and in accordance with law. *See*, *e.g.*, *Richardson*, 23 BRBS at 331. We therefore affirm the amount of temporary partial disability compensation awarded by the administrative law judge for the periods subsequent to September 30, 1997.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOM D. NELSON, Acting
Administrative Appeals Judge